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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 631

RUTH M. MORAIRTY, *Petitioner,*

against

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EVANS, HULL, KITCHEL & JENCKES,
DENISON KITCHEL,
NORMAN S. HULL,
RICHARD P. MEASON,
807 Title & Trust Building,
Phoenix, Arizona,
Attorneys for Respondent.

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Statement of the Case

Petitioner's statement is inaccurate and misleading. An accurate statement is contained in the opinion of the Court of Appeals, (R. 301-307), 178 F. 2d. 470 (471-473).

Summary of the Argument

1. The Court of Appeals decided the case in accordance with the decisions of the Supreme Court of Arizona resting upon adequate and independent State grounds.

2. All other points and arguments of petitioner are frivolous.

Argument

1. The opinion of the Court of Appeals is based squarely upon its resolution of the question stated in its opinion (R. 307), 178 F. 2d. 473, as follows:

> "* * * Whether or not, under the applicable Arizona law, appellant (petitioner) had established the defense* * * as a matter of law, and was, therefore, entitled to a directed verdict or to judgment notwithstanding the verdict."

Petitioner here requests a writ of certiorari only because she differs with the Court of Appeals in interpreting the decisions of the Supreme Court of Arizona. In so doing, petitioner suggests that the Supreme Court of Arizona held in the case of *Illinois Bankers' Life Ass'n* v. *Theodore*, 44 Ariz. 160, 34 P. 2d 423; 47 Ariz. 314, 55 P. 2d 806; 52 Ariz. 351, 80 P. 2d 963, that whether or not matters misrepresented or concealed by an applicant for life insurance are material is a jury question, and that the Court of Appeals erroneously construed the decisions in that case as holding that the only jury question is whether or not such matters are false (petition for certiorari, p. 8).

The case referred to came before the Arizona courts on three occasions, and the only issues of fact presented related to the falsity of the insurance applicant's representations. The Supreme Court of Arizona expressly held the representations to be material as a matter of law, in that the reported opinions point out that:

> (1) The representations concerned matters of fact within, or presumptively within the applicant's knowledge.
>
> (2) The same were obviously material in the highest degree.
>
> (3) Whether or not the applicant was afflicted with a specific disease, or whether or not he so believed, had no bearing on the case, because the insuring company could determine the conditions upon which it was willing to contract, and it was entitled to disclosure of symptoms of bodily disorder which would influence it in such respect.

On the first trial in the *Theodore* case, the defense was that the applicant had changed his residence because of his health, and that he had spat blood. There was some conflict in the evidence, and a judgment for the plaintiff was reversed for error in the instruction as to legal fraud (44 Ariz. 160, 34 P. 2d. 423).

On the second trial, the evidence was again in conflict as to whether or not the applicant had, in fact, so changed his residence for reasons of health and had spat blood, but there was presented as a further ground of defense that he had been afflicted with an habitual cough, and this latter claim was established by uncontradicted evidence. A judgment for the plaintiff was reversed as being contrary to the evidence. (The Court said (47 Ariz. 314, 329, 55 P. 2d. 806, 812)):

> "* * * The evidence does not sustain the vitally necessary finding that the deceased did not answer falsely the question in his application in regard to habitual coughing."

On the third trial, the jury was instructed to return its verdict for the defendant. The Supreme Court of Arizona refused to review the case in the absence of a transcript of testimony (52 Ariz. 351, 80 P. 2d 963).

In *Greber* v. *Equitable Life Assur. Soc.*, 43 Ariz. 1, 28 P. 2d 817, the Supreme Court affirmed a judgment on a directed verdict for the insurance company. Here again, the Court recognized that where—as in the case at bar—there is no conflict in the evidence as to a manifestly material misstatement in an application for life insurance, there is no issue of fact for a jury to pass upon. It specifically described such a misstatement as material "as a matter of law".

2. All other points and arguments of petitioner are frivolous.

a. The subject matter of the Arizona statute governing mandatory provisions in certain life policies (Sec.

61-705 (3), Arizona Code Annotated, 1939) was considered in the *Greber* case (43 Ariz. 1, 28 P. 2d 817) and in the first opinion in the *Theodore* case (44 Ariz. 160, 34 P. 2d 423). Petitioner's action in invoking it here does not furnish ground for certiorari.

New York Life Insurance Co. v. *McCurdy*, (C. C. A. 10) 106 F. 2d 181, Cert. Den., 309 U. S. 656, 60 S. Ct. 470, 84 L. Ed. 1005.

b. No federal question is involved, and so whether or not there be conflict in decisions of several courts of appeals is not a ground for certiorari.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

c. Petitioner is unable to point to anything in the record which would support its contentions (1) that there was any conflict in the evidence for the jury to resolve, or, (2) that respondent had knowledge of the matters concealed and misrepresented. Moreover, certiorari is not available to review evidence or the inferences drawn therefrom.

General Talk. Pictures Corp. v. *Western El. Co.*, 304 U. S. 175, 546, 58 S. Ct. 849, 82 L. Ed. 1273.

Conclusion

Petitioner seeks a writ of ceriorari for the sole purpose or rearguing her case. The evidence and the applicable law have been thoroughly reviewed and considered by the Court of Appeals.

It is respectfully submitted that this case is not a proper one for review in this Honorable Court, and that the petition for a writ of certiorari should be denied.

Dated this 21st day of March, 1950.

EVANS, HULL, KITCHEL & JENCKES,
DENISON KITCHEL,
NORMAN S. HULL,
RICHARD P. MEASON,
807 Title & Trust Building,
Phoenix, Arizona,

Attorneys for Respondent.